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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

03 Cr. 308 (LAK)

5 ARNOLD BENGIS,

6 Defendant.

7 -----x
8 July 19, 2017
9 11:45 a.m.

10 Before:

11 HON. LEWIS A. KAPLAN,

District Judge

12
13 APPEARANCES

14 JOON H. KIM
15 Acting United States Attorney for
the Southern District of New York
16 BY: KIERSTEN A. FLETCHER
Assistant United States Attorney

17
18 CREIZMAN, PLLC
Attorneys for Defendant
19 BY: ERIC M. CREIZMAN
MELISSA MADRIGAL

20
21 ALSO PRESENT:
JAMES CASSIN, Agent, NOAA

22 ANDREW BAUER, Arnold & Porter Kay Scholer

23 SAMUEL M. WITTEN, Arnold & Porter Kay Scholer

24 MR. BARNABAS XULU, ESQ., Representative of South Africa

25 Ms. Nomazothsho Memani, Representative of South Africa

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1 (Case called)

2 THE DEPUTY CLERK: Government, are you ready?

3 MS. FLETCHER: Yes. Good morning, your Honor.

4 Kiersten Fletcher for the government. I am joined at counsel's
5 table by James Cassin of NOAA.

6 THE COURT: Good morning.

7 THE DEPUTY CLERK: Defendant?

8 MR. CREIZMAN: Good morning, your Honor. Eric
9 Creizman and Melissa Madrigal of Creizman PLLC.

10 THE COURT: Good morning.

11 The first order of business is that there is a pending
12 motion by counsel for Mr. Bengis to vacate the order for
13 resentencing, and that motion is denied.

14 Now, some of what I am about to go through I believe
15 we covered last time, but I am just going to make sure for the
16 sake of good order.

17 Mr. Creizman, you and your client have had the
18 supplemented presentence report for the necessary period and
19 both have read it, correct?

20 MR. CREIZMAN: Yes, your Honor.

21 THE COURT: And Mr. Bengis continues to waive any
22 right he has to be present for the sentencing and has
23 deliberately absented himself, correct?

24 MR. CREIZMAN: Yes.

25 THE COURT: The presentence report will be sealed and

h7j2benS kjc

made available to counsel in the event of an appeal.

I take it there are no unresolved objections to the supplemented presentence report, is that correct?

MR. CREIZMAN: There are not.

THE COURT: And I believe I did this the last time, but to the extent it is relevant, I adopt the presentence report and the guideline computation and range that it contains.

I have received a small mountain of material that is relevant here:

I have the supplemented presentence report.

I consider at least in part relevant and so mention it the motion by Mr. Creizman filed May 10 for an order reversing the court's finding that Mr. Bengis has willfully failed to pay his restitution obligations and therefore to vacate the order for resentencing.

I have a letter from Mr. Creizman belatedly filed late yesterday.

I have at least two, I believe, letters from Arnold & Porter as counsel to the Republic of South Africa, as well as, if memory serves, two affidavits from government officials of South Africa, as victim impact statements.

I believe I have a letter from the government. Is that right, Ms. Fletcher.

MS. FLETCHER: Yes, you should, your Honor, dated July

h7j2benS kjc

14.

THE COURT: Thank you.

And the government kindly, at my direction, submitted a form of a preliminary order of forfeiture/money judgment.

Is there anything I have omitted to mention?

MS. FLETCHER: Your Honor, with respect to the government's submission, I would just note that the submission also included a declaration from NOAA Agent Jeffrey Ray, which attached certain invoices.

THE COURT: Yes, thank you.

Mr. Creizman?

MR. CREIZMAN: No. That's it. Thank you.

THE COURT: In the letter that was filed last night, Mr. Creizman, to my memory, for the first time in these proceedings, objected to the participation by Arnold & Porter in these proceedings, as distinct from the submissions made by officials of the Republic of South Africa.

Do I have that correctly, Mr. Creizman?

MR. CREIZMAN: I have no particular objection to Arnold & Porter participating. I have an objection to South Africa's participation in the proceedings beyond --

THE COURT: They are an alleged victim, and they have the right, as victims, do they not, to be heard on the question of sentencing?

MR. CREIZMAN: They have a right to be -- I think in

h7j2benS kjc

1 the court's discretion, they have a right to be heard; but,
2 under the Crime Victims -- the CVRA -- I think the "R" stands
3 for "restitution" -- a foreign government is not a victim,
4 although it is entitled to restitution. I think the court has
5 discretion to let South Africa make a victim impact statement.
6 I don't agree that it gives the right to South Africa to file
7 papers moving for forfeiture orders or making legal arguments.
8 I think that --

9 THE COURT: So I think what you just said is
10 essentially what I said a minute ago, which you started off
11 disagreeing with, I thought. You don't have any objection
12 to -- I no longer remember the lady's name, but the very
13 eloquent South African official from DAFF, or Mr. Xulu, who was
14 heard in the previous proceeding, and to the affidavits or
15 declarations they submitted, is that right?

16 MR. CREIZMAN: I have no problem with those.

17 THE COURT: I don't remember if there were
18 declarations or affidavits by other South African officials
19 submitted; but, if there were, you have no objection to that,
20 correct?

21 MR. CREIZMAN: No objection.

22 THE COURT: So what you are objecting to is only
23 things that Arnold & Porter has done or, in your view, may do
24 today.

25 MR. CREIZMAN: Correct. I thought your Honor was

h7j2benS kjc

1 mentioning Arnold & Porter particularly as a law firm as
2 opposed to --

3 THE COURT: You are objecting to whatever a law firm
4 for South Africa has done in the past or may do in the future.

5 MR. CREIZMAN: Absolutely.

6 THE COURT: All right.

7 Is it correct that up until the filing of your letter
8 last night, you did not voice any such objection?

9 MR. CREIZMAN: I did not voice any such objection.
10 But, to be fair, Arnold & Porter surfaced on July 6, and put in
11 a 14, 15 single-space page brief. In terms of responding to it
12 and reviewing the various issues that they have raised, I have
13 come to the conclusion -- I found I could say I object, but I
14 would like to have some legal support for it, and I think I do,
15 and I think I have laid that out in the letter last night.

16 THE COURT: Ergo, the short answer to my question, did
17 you prior to last night's letter raise any objection to
18 anything Arnold & Porter had done? The answer is, no, you
19 didn't, right, until last night?

20 MR. CREIZMAN: I have not raised an objection to their
21 being involved. I raised an objection to the substance of
22 their statements, yes.

23 THE COURT: You answered them on the merits.

24 MR. CREIZMAN: Yes.

25 THE COURT: You didn't object to them making the

h7j2benS kjc

1 arguments.

2 MR. CREIZMAN: That's right.

3 THE COURT: All right. Whatever has happened
4 *vis-à-vis* Arnold & Porter up to this moment is water over the
5 dam. Whatever it was, it was without objection from
6 Mr. Bengis, right, wrong, or indifferent.

7 Going forward, without in any way agreeing with
8 Mr. Creizman's position on this, in the interest of avoiding
9 what is already a 14-year litigation getting any longer
10 unnecessarily, I will not take into account the matters
11 advanced by Arnold & Porter, as distinct from its client, to
12 which Mr. Creizman belatedly objected last night, in
13 resentencing, except that I intend to defer, as I am permitted
14 to do, the question of whether and to what extent the
15 restitution obligation should be changed to a later date, and I
16 am making no determination at this time as to whether or not I
17 will consider whatever Arnold & Porter has had to say up until
18 this point on that set of issues. I don't have to do it today.
19 I am not reaching it one way or the other today. And if I
20 conclude that a change should be made in the restitution
21 obligation down the road, I will make clear whether I have
22 considered Arnold & Porter's submissions to which objection has
23 been taken. And if I should happen to fail to remember that,
24 Mr. Creizman, I am charging you with the personal obligation to
25 remind me.

h7j2benS kjc

1 MR. CREIZMAN: I will, your Honor.

2 And may I just note that I have objected in my letter
3 last night and I have asked the court to strike those documents
4 and to not consider them, just to be -- to make sure that
5 that's clear. I understand that your Honor considers my
6 objection belated, but I objected to it and whether -- I
7 don't -- I mean, it is later than I think I would have liked to
8 have objected to it, but it is objected to.

9 THE COURT: I already told you I am not considering it
10 for any purposes today. You want me also to strike them? I
11 have stricken them --

12 MR. CREIZMAN: Thank you, your Honor.

13 THE COURT: -- in a physical, not a legal, sense. I
14 don't know what else I can do but not consider them. I could
15 take a buggy whip to them.

16 MR. CREIZMAN: Thank you.

17 THE COURT: Then, Mr. Creizman, I will now hear you on
18 the resentencing.

19 MR. CREIZMAN: So I take it that your Honor is not
20 considering today the issue on the forfeiture.

21 THE COURT: No. That's not what I said at all. I am
22 going to rule on the forfeiture today.

23 MR. CREIZMAN: Okay.

24 THE COURT: I said I was deferring restitution.

25 MR. CREIZMAN: So I am going to object to the

h7j2benS kjc

1 forfeiture for the reasons stated in my letter. Of course I
2 have submitted that late last night and understandably, so I
3 don't know, and I'm sure your Honor has plenty to do before
4 this appearance, so I don't want to repeat what I have said in
5 the letter --

6 THE COURT: I read your letter, but this is your
7 opportunity to advocate orally.

8 MR. CREIZMAN: Okay, and I am going to do that.

9 So I think that 3614, there is nothing in the
10 statute -- the statute says that the court may resentence and
11 impose the sentence it could have originally imposed. In the
12 situation of restitution, in the situation of forfeiture, any
13 court that has applied, that is, increased a fine or increased
14 restitution has done so where an initial finding has been made
15 as to what the maximum is, and that particular defendant was
16 sentenced below the maximum.

17 So, for example, in the *Johnston* case, where there was
18 a 250,000 -- where he was sentenced -- where he was provided --
19 where he was ordered to pay restitution in a lesser amount than
20 his codefendants because he cooperated, similar to the
21 situation as Grant Berman and Shaun Levy in this case, when the
22 court found that he willfully failed to pay restitution, it
23 resented him to additional prison time and it also increased
24 his restitution amount to the amount of his codefendants,
25 jointly and severally.

h7j2benS kjc

1 So in that situation, similarly, there is no basis --
2 the court has found, the government, which is the litigant
3 here, and Mr. Bengis stipulated to a \$5.9 million forfeiture
4 amount, which represented the gross proceeds. Rule 32.2 of the
5 Federal Rules of Criminal Procedure requires the court to make
6 a finding. The court made that finding. And that represents
7 the amount of forfeiture. It is not an opportunity to revisit
8 that particular decision because there are no new facts that
9 are presented, and it goes against the idea of *res judicata*,
10 finality of judgments; and, for that very reason alone, 3614
11 does not provide the court the authority to impose a higher
12 restitution order than was originally imposed.

13 Second, I think that I am troubled by the fact that
14 what the United States is attempting to do here is to obtain
15 what they cannot otherwise obtain through normal process. They
16 are concerned that a court in the Royal Court of Jersey will
17 rule against their interests, and so what they are doing is
18 asking this court to impose an order of forfeiture so that
19 those funds are frozen and perhaps brought to the United
20 States, where your Honor could hear the same issues that are
21 being heard over in the Royal Court of Jersey. I oppose that.
22 I don't think that there is a basis for that.

23 The point that I think is clear here is that South
24 Africa has not been involved. They have not been apprised of
25 any of these proceedings. They didn't know about the 1.8

h7j2benS kjc

1 million. It's not an accident that they are involved now.
2 They are involved now because it is an opportunity for the
3 United States to argue what it can't argue because of the plea
4 agreement. It is an opportunity to have South Africa make the
5 argument that please order a forfeiture order so that we can
6 get restitution, and I don't believe that that is fair and I
7 don't believe that that is -- and I think that this is a way to
8 circumvent.

9 THE COURT: The fairness argument cuts in various ways
10 in this case.

11 Mr. Bengis, years ago, admitted to a personal net
12 worth of \$25 million, and now he says that \$24.3 million of
13 that is gone, and it is gone because he, in circumstances where
14 the United States was pursuing a restitution judgment against
15 him, which he knew could be in the tens of millions of dollars,
16 arranged his affairs in Jersey in such a way as to make the
17 money disappear into trusts that, as I understand it -- correct
18 me if I am wrong -- are under the control of the long-time
19 family lawyer who it is reasonable to infer does exactly what
20 Mr. Bengis and the family tells him to do, in order to
21 circumvent U.S. law and the ability of a U.S. court to enforce
22 restitution rights against the fortune that he amassed at least
23 in part by criminal behavior to which he has pleaded guilty in
24 a U.S. court.

25 MR. CREIZMAN: I don't think that's fully accurate,

h7j2benS kjc

1 your Honor.

2 THE COURT: If it's not, I am happy to hear the
3 correction.

4 MR. CREIZMAN: This is my understanding:

5 There are trustees. The trustees are professional
6 corporations that control the money and that make decisions in
7 the best interests of the beneficiaries. There was a decision
8 at a certain point that -- and as we pointed out in our May 10
9 letter, in our May 10 submission -- that it wasn't Arnold
10 Bengis as protector, all Arnold Bengis could do as protector is
11 to veto or approve distributions. He couldn't ask the trustees
12 for distributions. He wasn't a beneficiary of the trusts. And
13 at the time --

14 THE COURT: Unless, of course, the beneficiaries
15 agreed to whatever he wanted, right?

16 MR. CREIZMAN: Well, I think theoretically. So I
17 don't know that he was -- my understanding is that he wasn't at
18 that point -- at some point he was a beneficiary, but at some
19 point the trustees reconfigured the trusts.

20 THE COURT: And wouldn't it be true, right here in the
21 State of New York, that if you had a trust and you had
22 J.P. Morgan as the trustee, and the proposed object of a
23 distribution was not a beneficiary under the trust agreement,
24 but all beneficiaries concerned with the trust consented to
25 J.P. Morgan making a distribution to a nonbeneficiary,

h7j2benS kjc

1 J.P. Morgan could quite freely go right ahead and do it?

2 MR. CREIZMAN: I suppose that's correct, yes.

3 THE COURT: And I suppose it is true in Jersey, too.

4 MR. CREIZMAN: But what happened here is that, while
5 your Honor is correct that the change was made, Mr. Bengis was
6 no longer the protector, and he knew that the United States was
7 pursuing restitution. At that point your Honor had already
8 declined restitution and the matter was on appeal.

9 THE COURT: I declined it not on the ground that it
10 wasn't warranted, but on the ground that the whole thing was
11 too complicated and shouldn't be determined as part of a
12 criminal case, it should be determined in civil litigation; and
13 the Court of Appeals, in its wisdom, disagreed with me. They
14 thought it was a very simple matter, easily and quickly
15 resolved, and here we are 13 years later.

16 MR. CREIZMAN: Your Honor, I also, to just -- because
17 your Honor asked me to remind you about certain things, and I
18 wanted to remind your Honor that you also reasoned that South
19 Africa didn't own the fish and your Honor also reasoned that it
20 wasn't a victim of the Lacey Act offense, which I thought were
21 quite strong arguments.

22 THE COURT: Well, I did at the time, and now we are
23 both much smarter, as we always are when the Court of Appeals
24 points out the error of our ways.

25 MR. CREIZMAN: It seems -- I think -- I don't know if

h7j2benS kjc

1 I agree with that.

2 But the point being --

3 THE COURT: Look. The simple fact is, just to draw an
4 analogy -- I don't mean to imply that the point controls at
5 all -- someone who is a defendant in litigation and transfers
6 assets under the New York Debtor and Creditor Law has committed
7 a fraudulent conveyance by virtue of the pendency of the
8 litigation alone. Isn't that true?

9 MR. CREIZMAN: That's true, but I don't know that
10 Arnold Bengis is the one who did that, and I also don't know
11 why Mr. David Bengis would have been made the beneficiary, who
12 also was being pursued for restitution at that time, and there
13 was certainly no indication that David Bengis -- he was under
14 the same joint -- the government was pursuing joint and several
15 liability against him, too. So the government's story of
16 Mr. Bengis manipulating these trusts in a way to evade the
17 United States's pursuit is, I think, overblown and it is not
18 completely accurate.

19 THE COURT: Only partly accurate.

20 MR. CREIZMAN: It may be partly accurate.

21 THE COURT: So it's partly accurate that he
22 manipulated the trust --

23 MR. CREIZMAN: No. I am saying that it is not fitting
24 in entirely with their story, right, because if it did -- it
25 would make sense, I would agree it would make sense if David

h7j2benS kjc

1 Bengis was not named as the beneficiary. He was. Why would he
2 have been named as beneficiary?

3 THE COURT: The beneficiary or --

4 MR. CREIZMAN: A beneficiary.

5 THE COURT: -- sole beneficiary.

6 MR. CREIZMAN: He was named as a beneficiary. I would
7 have to look at what -- I think he was the sole beneficiary,
8 because I don't think there were any other beneficiaries. And
9 Arnold Bengis was not. So that, to me, says that whatever the
10 reasons were for the trustee to reorganize the trusts, it may
11 not have been to evade the United States' pursuit of
12 restitution. It may have been, as has been argued in the Royal
13 Court of Jersey, to benefit the future generations of the
14 Bengis family, and that is the argument that was laid out in
15 the motion to vacate and that is the argument I am making to
16 your Honor.

17 THE COURT: Obviously it benefited them, you know.
18 What happened, in broad strokes, is that, rather than wait
19 until he died and transfer the property by will, with the
20 United States hot on his heels, he gave it away, perhaps, at
21 least in form, before the United States could get at it.

22 MR. CREIZMAN: If he directed the trustees to do that,
23 which I don't know that the United States has offered proof for
24 that, and I am saying that there are facts that are
25 inconsistent with the United States's argument. So that is all

h7j2benS kjc

1 I am saying.

2 And I am also saying that the Royal Court of Jersey
3 is, because of your Honor's order, because of the deposit order
4 and your Honor's order saying that no one can help, not Arnold
5 Bengis, David Bengis, Jeffrey Noll, or anyone in concert with
6 them can remove the funds from that account for their benefit,
7 SG Hambros has refused to disburse those monies at the
8 direction of the trustees. The principal matter being
9 litigated -- there were hearings on this, as I understand it --
10 is whether Arnold Bengis is a beneficiary, the beneficial
11 owner, controller, etc., of those funds and whether those funds
12 ever belonged to Mr. Bengis. The court is going to make a
13 ruling on that. And what the United States is trying to do,
14 and I think indirectly, so as not to blatantly violate the plea
15 agreement, is to get the authorities in South Africa to the
16 United States and then get involved in this litigation and ask
17 for an order of forfeiture.

18 THE COURT: Do you have any -- any -- evidence to back
19 up the assertion --

20 MR. CREIZMAN: I --

21 THE COURT: Let me finish.

22 -- that it is the United States pushing South Africa
23 to get involved, as distinguished from South Africa pushing the
24 United States?

25 MR. CREIZMAN: Yes. Yes, I do.

h7j2benS kjc

1 THE COURT: What --

2 MR. CREIZMAN: I have --

3 THE COURT: Don't talk over me, Mr. Creizman.

4 MR. CREIZMAN: Oh, I wouldn't.

5 THE COURT: I'm glad you wouldn't. I am reassured.

6 Where is the evidence in your papers?

7 MR. CREIZMAN: It is circumstantial. It is
8 circumstantial evidence. And similar to the evidence that the
9 United States has offered that Arnold Bengis has reconfigured
10 the trusts to evade the United States' pursuit of restitution,
11 in this case, what we have is, South Africa, in South Africa's
12 papers -- first of all, the government went to Arnold & Porter.
13 I mentioned the --

14 THE COURT: The government went to Arnold & Porter?

15 MR. CREIZMAN: I didn't say the government went to
16 Arnold & Porter.

17 THE COURT: Yes, that's exactly what you said.

18 MR. CREIZMAN: I just said that, right, but I am
19 giving your Honor the basis for my --

20 THE COURT: This is the alternate facts version.

21 MR. CREIZMAN: This is my theory. And just as the
22 government has extrapolated from and has inferred from various
23 facts that Arnold Bengis hid the money from the United States
24 and brought it outside of its jurisdiction, I believe that the
25 very fact in Arnold & Porter's papers that South Africa had no

h7j2bens kjc

1 idea that David Bengis a year ago provided or two years ago
2 gave \$1.25 million in restitution, no idea. That the South
3 Africans --

4 THE COURT: And you know that how?

5 MR. CREIZMAN: It is in Arnold & Porter's papers.

6 THE COURT: They said they had no idea about it?

7 MR. CREIZMAN: I will -- it is in their July 6 paper.
8 It is in a footnote.

9 THE COURT: So this Arnold & Porter paper you want me
10 to consider, is that right?

11 MR. CREIZMAN: I don't know.

12 THE COURT: I'm just trying to find out, Mr. Creizman.

13 MR. CREIZMAN: Your Honor, it is a belated filing last
14 night, so I am tired on that one.

15 THE COURT: It was not only belated last night, it was
16 due Monday.

17 MR. CREIZMAN: No. Yes. Yes, it was.

18 THE COURT: Footnote 2 on page 2 of the July 6 letter,
19 if I am allowed to look at it, it says the amount currently
20 outstanding is \$21.19 million, which reflects the \$1.25 million
21 payment by David Bengis.

22 MR. CREIZMAN: That's right. But --

23 THE COURT: It certainly nails the point that they
24 didn't know about it.

25 MR. CREIZMAN: Later in the brief it nails the point,

h7j2benS kjc

1 though. The point is nailed later in the brief. I may be --

2 THE COURT: -- wrong.

3 MR. CREIZMAN: No.

4 THE COURT: Mr. Creizman, let's go on.

5 MR. CREIZMAN: Footnote 18 on page 13, "South Africa
6 has recently learned that the \$1,250,000 that David Bengis paid
7 to satisfy his restitution obligation is still being held by
8 the Clerk of the Court," etc.

9 I don't think.

10 THE COURT: So that means they learned it.

11 MR. CREIZMAN: They learned it because they -- but
12 they only recently learned it because there was a necessity to
13 involve South Africa in these proceedings so that the --

14 MS. FLETCHER: Your Honor --

15 THE COURT: Ms. Fletcher, cool your jets.

16 Look. That's one of these arguments like, It's
17 raining outside, and therefore the defendant must be innocent.
18 There is just no connection between the statement and the
19 conclusion. None.

20 They recently learned it? Okay. That proves that the
21 United States initiated this with them? Give me a break.

22 MR. CREIZMAN: Let's forget about what the motives
23 are. The effect of what is happening here with South Africa
24 making this forfeiture argument and the government saying we
25 are not going to violate the plea agreement, but we don't see

h7j2benS kjc

1 any problem with it, that, to me, is a way to circumvent the
2 plea agreement.

3 THE COURT: Look. Well, a way to circumvent the plea
4 agreement. If, by that, you mean that because South Africa has
5 taken an initiative here, there may be a result which the
6 United States, had it not had input from the victim, might not
7 have pursued, and maybe could not have pursued, it's now being
8 pursued. All right, I guess. If by that you mean that the
9 nefarious scheme hatched by the United States government to put
10 the South Africans up to doing something that would get the
11 United States around its plea agreement, I see not a shred of
12 evidence to support that, however much you might wish it
13 exists.

14 MR. CREIZMAN: Well, assuming that it is not
15 nefarious, it is still inappropriate. It's an inappropriate
16 argument, and I pointed out cases saying --

17 THE COURT: Bottom line, your guy owes South Africa
18 \$21.19 million. He was a vastly rich man. He transferred his
19 assets, and he is trying to get away with it.

20 MR. CREIZMAN: But that --

21 THE COURT: That's what's happening.

22 MR. CREIZMAN: But that is your -- and that is what
23 your Honor is taking from what your Honor sees as the facts,
24 but not all of the facts are before the court and, as I already
25 pointed out, there are some facts that are inconsistent with

h7j2benS kjc

1 that, and there is a court that is hearing this.

2 THE COURT: The guy had 25 million bucks. He had the
3 ability to do the honorable thing, and that would have been,
4 years ago, to write the check for \$21 million.

5 Instead of writing the check for \$21 million, the
6 money winds up in Jersey. The trusts get all rearranged. He
7 is now paying you -- well, I hope, for your sake -- to try to
8 defend what happened and to pass the money to his heirs and to
9 leave the victim of what he did and what he pleaded guilty to
10 doing high and dry. That's what's going on here, however you
11 slice it.

12 MR. CREIZMAN: But there is a -- and I am not saying
13 that -- I have already come before the court and I have said
14 that Arnold Bengis clearly owes the South African government
15 money, he is in default, but I don't believe he is in willful
16 default. I don't believe the evidence is there to show that he
17 is in willful default.

18 I also would say that, at the same time, there was,
19 and I think your Honor will recall, there was no -- at the
20 time, before he was sentenced, there was not even the slightest
21 indication that the restitution that would be sought would be
22 anywhere in the realm of \$100 million or whatever the amount
23 was, especially after -- and I understand, and one of the
24 arguments we made to your Honor at sentencing for a downward
25 departure was the sort of double jeopardy argument, as you will

h7j2benS kjc

1 recall. In that case, the weakness in our argument was that
2 Mr. Bengis had not personally been prosecuted in South Africa.
3 In this case, in this case, in terms of restitution, Hout Bay
4 was prosecuted. Hout Bay negotiated with the National
5 Prosecuting Authority and they forfeited money. And we heard
6 from the eloquent representative of DAFF just the other day who
7 said, well, the National Prosecuting Authority doesn't speak
8 for us. We are a different organization. We are a different
9 agency.

10 THE COURT: Mr. Creizman, we are getting off the
11 point.

12 MR. CREIZMAN: A little.

13 THE COURT: You have been on your feet quite a long
14 time and I have a meeting at 1:00 and other cases to hear
15 today, so could you try to wrap it up?

16 MR. CREIZMAN: Yes. Yes, I can.

17 So I think I have made the arguments with respect to
18 the forfeiture issue in my papers, international comity, why
19 Federal Rule of Criminal Procedure 38 doesn't authorize the
20 court to do what the South African government wants it to do.

21 So I just wanted to say some things about Mr. Bengis,
22 which is that, notwithstanding the fact that he hasn't, as your
23 Honor said, done the honorable thing, you know -- and, again, I
24 think that we are assuming that he certainly can, but putting
25 that aside -- he has paid \$7 million to South Africa. He has

h7j2benS kjc

1 paid \$7 million, \$7.5 million in forfeiture to the United
2 States. David Bengis has paid \$1.5 million in forfeiture --
3 I'm sorry \$1.25 million in forfeiture. Arnold Bengis has
4 offered to relinquish the \$1.8 million bond in restitution, I'm
5 sorry, and David paid 1.25 in restitution.

6 That amounts somewhere in the range of \$18 million,
7 okay? I don't know how much of the forfeiture that the United
8 States received went to South Africa. I suspect not too much
9 because South Africa has said that they were empty-handed. But
10 Mr. Bengis has paid \$18 million. He has lived with this case
11 since 2002, 2001, first in South Africa and then here. And
12 this case, as your Honor has pointed out, has gone on 13 years.
13 And while it is painful for your Honor --

14 THE COURT: 14.

15 MR. CREIZMAN: 14.

16 And while it is painful for the court, one could
17 imagine how painful it is for the Bengis family and for Arnold
18 Bengis. Arnold Bengis -- and your Honor said at sentencing
19 something along the lines of that, Good and bad are not too
20 sides of the same wall, or it was more eloquent and it was good
21 and I have quoted it in a sentencing brief before. But the
22 point being that Arnold Bengis has done a lot of good. For the
23 harm he has caused South Africa, the evidence that's being
24 brought here about him and the statements and the allegations I
25 think are way overblown. It ignores all of the other causes of

h7j2benS kjc

1 problems in South Africa, all of the other causes to the rock
2 lobster population.

3 Mr. Bengis is a grandfather. He is 81 years old. He
4 wants to live the rest of his life out in peace, I think his
5 family would appreciate that. I think that he served his
6 time --

7 THE COURT: There is a reasonably clear way for him to
8 do that.

9 MR. CREIZMAN: Yes, yes, there is. But, your Honor,
10 at the same time, I think that as compared to other similarly
11 situated individuals, people who have been convicted of crimes,
12 who have hurt human beings, who have stolen people's property,
13 who have left people penniless, they have paid much less than
14 Mr. Bengis has; they have served, I wouldn't necessarily say
15 less time, but they certainly have not been pursued the way
16 Mr. Bengis has. I am asking the court to be as lenient as
17 possible, certainly not to impose this forfeiture order, and I
18 am asking the court to be lenient as possible with Mr. Bengis,
19 who -- certainly I think there is no -- the need for a general
20 deterrence has been met in this case, and I believe that he is
21 no danger to society at this point. He hasn't been in the
22 fishing business for years, and the problems that South Africa
23 is facing in that business with abalone and other things, those
24 are the causes of other poachers. I think Mr. Bengis --

25 THE COURT: Okay, Mr. Creizman.

h7j2benS kjc

1 MR. CREIZMAN: Okay, well, then, that's all I have to
2 say. Thank you, your Honor.

3 THE COURT: Thank you.

4 Ms. Fletcher.

5 MS. FLETCHER: Thank you, your Honor. I will be very
6 brief.

7 Just by way of short background on the government's
8 resentencing motion, as your Honor is aware, that motion was
9 filed in December. Your Honor granted the government's motion
10 for resentencing in March. The government, prior to March, had
11 no contact with anyone representing the government of South
12 Africa in connection with these proceedings. The motion for
13 resentencing was motivated entirely by the government's view,
14 which I think your Honor shares, that the defendant was ordered
15 to pay \$21 million in restitution, he had the money at the time
16 that the restitution issues were in the early stages of
17 litigation, and then, through a series of steps that I
18 understand your Honor is very familiar with and so I won't
19 belabor, moved those funds into an account where the U.S.
20 government couldn't touch them. And it was the government's
21 goal in filing the motion to ask this court to exercise its
22 discretion and to take whatever steps in connection with
23 resentencing it viewed as appropriate and it viewed as likely
24 to ensure compliance with the restitution order. That's it.

25 Only after your Honor granted the resentencing motion

h7j2benS kjc

1 did the government learn of the South African government's
2 interest in these proceedings, and, contrary, frankly, to very
3 baseless assertions by Mr. Creizman, that was not at the
4 government's initiation.

5 The government was surprised to receive a phone call
6 from a lawyer representing South Africa, and provided
7 information to that lawyer about the proceedings -- and this is
8 Mr. Bauer -- about the proceedings, about the current state of
9 play for the restitution payments that had already been made,
10 and about the schedule for the resentencing.

11 There is no ulterior motive here, your Honor. The
12 government did not in any way suggest that Mr. Bauer or that
13 South Africa should pursue a forfeiture order. It merely
14 presented to counsel for South Africa what the issue was, which
15 frankly was that, notwithstanding significant efforts by the
16 government, both domestically and in Jersey, there did not
17 appear to be any mechanism to enforce the restitution order.

18 So with respect to the civil litigation going on in
19 Jersey, your Honor, yes, that civil litigation does relate to
20 who the beneficial owners are of those accounts; but even if,
21 for example, the court rules that Arnold Bengis is the
22 beneficial owner of the accounts, there is no mechanism for the
23 government to secure those accounts to pay the restitution
24 obligation. So in light of that, the government didn't seek to
25 intervene in those proceedings. It would not have accomplished

h7j2benS kjc

1 our goal, which is trying to get the restitution payment paid.
2 That's it.

3 I am happy to address any of the issues in
4 Mr. Creizman's papers that your Honor would like me to.

5 I think, as your Honor is aware, I have made very
6 clear the government's insistence on standing by the terms of
7 its plea agreement. I even refused to answer some of your
8 Honor's questions during the last proceeding for fear that they
9 might be construed as advocating for forfeiture. The
10 government does not advocate for forfeiture and simply notes
11 for your Honor that the research I have done at your Honor's
12 direction, my review of the case law cited by Mr. Creizman, I
13 see no reason why your Honor in these proceedings is
14 constrained in terms of the relief it can impose under 3613(a)
15 and 3614.

16 So unless your Honor has any questions, I am happy to
17 sit down.

18 THE COURT: Okay. Thank you.

19 I have a question for both of you. I wonder, assuming
20 for the sake of discussion, that I impose a new forfeiture
21 amount, whether paragraph 1 of the form of order that the
22 government submitted at my direction is worded appropriately in
23 this respect. Would it not be more accurate if it read as
24 follows:

25 "As a result of the offenses charged in Count One of

h7j2benS kjc

1 the indictment to which the defendant pled guilty" -- that much
2 is the same -- insert, "the defendant shall forfeit to the
3 United States the amount of X in U.S. currency and a money
4 judgment shall be entered."

5 MS. FLETCHER: Yes, your Honor. I think that would
6 make it more clear.

7 THE COURT: Any problem, Mr. Creizman?

8 MR. CREIZMAN: Your Honor, quite frankly I haven't
9 seen the government's proposed order. I don't know how that
10 happened.

11 MS. FLETCHER: I am happy to hand Mr. Creizman a copy.
12 It was attached to an e-mail I sent yesterday.

13 MR. CREIZMAN: Okay. Sorry about that.

14 (Pause)

15 MR. CREIZMAN: I agree your Honor's suggestion makes
16 it clearer.

17 THE COURT: Thank you.

18 A couple of odds and ends before I pronounce sentence:

19 Reference has been made by Mr. Creizman to a supposed
20 requirement for a finding of willful failure to pay restitution
21 derived from 18 United States Code 3614. At one point he
22 indicated that I previously made a finding of willfulness. At
23 another point I think he indicated that I have not and that
24 such a finding would be not warranted.

25 I look at the statute. Section 3614(a) says that

h7j2benS kjc

1 subject to subsection (b), the court may resentence to any
2 sentence which might originally have been imposed on a finding
3 of knowing failure to pay restitution. I have certainly made a
4 finding of knowing failure.

5 (b) reads, in relevant part: The defendant may be
6 sentenced to a term of imprisonment under Subsection (a) only
7 if the court determines that the defendant willfully refused to
8 pay the delinquent fine or had failed to make sufficient *bona*
9 *fide* efforts to pay the fine; or, in light of the nature of the
10 offense and the characteristics of the person, alternatives to
11 imprisonment are not adequate to serve the purposes of
12 punishment and deterrence.

13 Thus, the plain language of the statute seems to me on
14 its face to require a finding of willfulness only as a
15 predicate to a term of imprisonment based on failure to pay a
16 fine or to make *bona fide* efforts to do so. There is no
17 mention in clause (b) of restitution at all. Thus the plain
18 language of the statute seems to indicate that imprisonment may
19 be imposed for knowing failure to pay restitution, and that a
20 finding of willfulness is not necessary for that purpose.

21 Nonetheless, against the possibility that a higher
22 court might take a different view of my reading of the statute,
23 I find, if I have not done so already, that the failure to pay
24 restitution in this case has been willful.

25 Second, I intend to impose a higher term of

h7j2benS kjc

1 imprisonment as part of the resentencing. I want to be clear
2 about why I am doing it. I certainly understand Mr. Bengis is
3 elderly. As is true with almost anyone of his age, he is
4 ailing in some ways. I impose a higher term of imprisonment in
5 any case with somebody of that age only with the greatest
6 reluctance. Given my view of his behavior, however, I think I
7 have to apply all of the factors of the Sentencing Reform Act,
8 and I do, and to reflect the seriousness of the offense and the
9 need for general and specific deterrence.

10 Now, what has gone on here, in my judgment, is a
11 blatant attempt by Mr. Bengis to put his assets beyond the
12 reach of the United States in order to avoid the enforcement of
13 what he feared and came ultimately to know would be a very
14 large restitution obligation imposed upon him.

15 I understand, based on my familiarity with the
16 chronology, that all or much of his actions of avoidance came
17 at a time when this court had declined to impose restitution,
18 but the case was on appeal to the Court of Appeals, so the
19 actions were taken with a claim of the United States for a very
20 large amount of restitution -- if memory serves, \$90 million,
21 but I may be off on that -- was pending against him and when my
22 decision was subject to being overturned, as it was, in the
23 fullness of time.

24 It is necessary to make clear that the United States
25 is not going to tolerate this behavior in this case or in any

h7j2benS kjc

1 other case, and putting Mr. Bengis aside for just a moment,
2 people who contemplate these kinds of so-called asset
3 protection measures, as certain elements of the bar like to
4 refer to them, or evasion, as others might refer to them, carry
5 with them very large risks, one of them being more jail time.

6 Now, whether the United States will pursue arrest and
7 extradition, whether it will succeed, I have no idea. That's
8 an executive branch function. It's up to them. Whether a
9 jurisdiction in which Mr. Bengis may find himself would grant
10 extradition in these circumstances is not up to me either.
11 It's above my pay grade, to use the vernacular. But there is
12 value even to Mr. Bengis understanding that one of these days,
13 there may be a knock at the door and a pair of handcuffs in his
14 future, and he ought to feel that.

15 I think it need not be part of the sentence for me to
16 dispose of the \$1.8 million with the clerk, is that right,
17 folks? Ms. Fletcher? Mr. Creizman?

18 MR. CREIZMAN: Mr. Bengis has relinquished any right
19 to that.

20 THE COURT: Is there any reason why we should not just
21 order the payment of that money to the Republic of South
22 Africa?

23 MS. FLETCHER: No reason, your Honor.

24 THE COURT: Submit a form of order to my chambers
25 hopefully by tomorrow, after which I hope to go on to a

h7j2benS kjc

1 vacation and maybe catch a fish of my own, providing for that
2 payment.

3 MS. FLETCHER: I will, your Honor.

4 THE COURT: I am going to impose forfeiture. I want
5 to say a word or two about it, although I will file a
6 memorandum in due course explaining how I got to where I have
7 gotten.

8 There is a distinction between the legal standard that
9 governs forfeiture and the legal standard that governs
10 restitution, and everybody should understand I have that firmly
11 in mind. What I say today on forfeiture does not necessarily
12 determine what I will do on restitution, if anything. And any
13 amounts may wind up being different.

14 Forfeiture is intended to obtain from the defendant
15 ill-gotten gains. Restitution is intended to restore to a
16 victim losses. I have basically have not accepted for
17 forfeiture purposes a lot of the arguments South Africa has
18 made for a variety of reasons. I have concluded on the basis
19 of the OLRAC study, the specific part of it adopted by the
20 Second Circuit and subsequently by me, that Mr. Bengis, for the
21 year 1999 to 2000, received at least \$26,312,000 as a result of
22 the crimes in question. He has had the benefit of the use of
23 that money for a period of more than 15 years. There is a time
24 value to money. I have taken a look at the rates available on
25 U.S. government treasury obligations during that period. It

h7j2benS kjc

1 has up to now been an eyeballing of the chart. I have included
2 in the restitution amount that I will ultimately impose simple
3 interest for the use of that \$26.3 million for the years 2001
4 through today, and I have used a rate of 2 1/2 percent, which
5 is my rough eyeballing of what the average probably was for
6 that period. It has gone as high as 6 percent and considerably
7 lower, and the chart has peaks and valleys. So the interest is
8 about \$10.9 million, and that's how I got there and will
9 explain it in more detail later. And if either side cares
10 enough about it to do a more precise interest rate calculation
11 based on the \$26,312,000 figure, which I am firm on, and you
12 can get it to my chambers by Monday, I would consider whether
13 to correct that part of the judgment under Rule 36, I think it
14 is, to reflect a more precise interest number. I don't know
15 that it is going to be material to anybody and I am, frankly,
16 not expecting to get that, but if I don't get it by Monday, you
17 know the seven days are going to run.

18 Okay. All of that said, it is the judgment of this
19 court that Mr. Bengis be committed to the custody of the
20 Attorney General of the United States or his designee for a
21 term of imprisonment of 57 months on each count, the terms to
22 run concurrently; that he thereafter serve a term of supervised
23 release of two years on each count, the terms to run
24 concurrently; that Mr. Bengis pay the mandatory special
25 assessment of \$400.

h7j2benS kjc

1 It is further adjudged that Mr. Bengis forfeit to the
2 United States of America the sum of \$37,200,838.36 as lawfully
3 set forth in the order of forfeiture which I have signed today
4 and which, upon entry of judgment, if not before, is final as
5 to Mr. Bengis. I say that lest the court in Jersey
6 misunderstand the finality of the forfeiture. It is final
7 today.

8 The term of supervised release shall be subject to the
9 mandatory and standard conditions of supervision 1 through 13,
10 in addition to this special condition: The defendant shall
11 provide the probation officer with any financial information
12 and documentation he or she may request.

13 The mandatory drug testing condition is suspended
14 because I find a low risk of substance abuse.

15 I advise Mr. Bengis, through his counsel, that to
16 whatever extent he hasn't waived it, he has the right to appeal
17 from the judgment imposing his sentence. If he wishes to
18 appeal, he must file a written notice of appeal within ten days
19 after the date on which judgment is entered, which I hope will
20 be today and, most surely, will not be later than tomorrow.

21 If he wishes to appeal and can't afford to pay the
22 fees necessary to do so, he has the right to apply for
23 permission to appeal as a poor person, and if such an
24 application were made and granted, he would be permitted to
25 appeal without payment of the fees.

h7j2benS kjc

1 Is there anything else, folks?

2 MS. FLETCHER: Yes, your Honor, if I may, just a few
3 points of clarification.

4 I understand your Honor's forfeiture ruling to relate
5 to proceeds that the defendant received during the 1999 to 2000
6 period. Recognizing that that is not, obviously, the entire
7 period over which the defendant received ill-gotten gains, is
8 it your Honor's intention to make that \$37 million forfeiture
9 amount be in addition to forfeiture already paid or to act as
10 the total against which the prior forfeiture should offset?

11 THE COURT: It's in addition to the forfeiture already
12 paid --

13 MS. FLETCHER: Okay. Thank you, your Honor.

14 THE COURT: -- which was for an earlier period.

15 MS. FLETCHER: That's my understanding, as well, but I
16 wanted to clarify. Thank you, your Honor.

17 THE COURT: Okay. Anything else?

18 MS. FLETCHER: With respect to the defendant's
19 commitment to the custody of the Attorney General, is it your
20 Honor's intention to require the defendant to surrender
21 immediately or set a short surrender date?

22 THE COURT: Surrender immediately. I mean, as a
23 practical matter, it's meaningless, because he is out of the
24 country.

25 MS. FLETCHER: I understand, your Honor.

h7j2benS kjc

1 Given that your Honor would like him to surrender
2 immediately, the U.S. Attorney's office will likely be bringing
3 over later today an arrest warrant for your Honor to sign.

4 THE COURT: Okay.

5 Just for my information, that suggests to me that the
6 government will try to extradite him. Is that right?

7 MS. FLETCHER: We will certainly try.

8 THE COURT: Okay.

9 Anything else, Mr. Creizman?

10 MR. CREIZMAN: No, your Honor. Thank you.

11 THE COURT: Thank you.

12 - - -